Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
ALLIANCE CONTACT SERVICES, *et al.*	)	CG Docket No. 02-278
	)	DA No. 05-1346
Joint Petition for Declaratory Ruling That	)	
The FCC has Exclusive Regulatory Jurisdiction	)	
Over Interstate Telemarketing	)	

MEMORANDUM IN SUPPORT THE STATE OF INDIANA'S MOTION TO DISMISS ALLIANCE CONTACT SERVICES *ET AL.'S* JOINT PETITION ON GROUNDS OF SOVEREIGN IMMUNITY

In its April 29, 2005, Joint Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction over Interstate Telemarketing with respect to certain provisions of the Indiana Revised Statutes and Indiana Administrative Code ("Petition"), Alliance asks the Commission to preempt all state telemarketing regulations as applied to interstate calls. Alliance bases this request on the incorrect conclusion that Section 2(a) of the Communications Act of 1934 grants exclusive jurisdiction to the Commission over all interstate and foreign commerce in communication, including interstate telemarketing, and that sections 227(e) and (f) of the TCPA provide states with no authority whatsoever over interstate calls. (Alliance Petition at 3, 28) The Petition, however, in effect attempts to drag states with telemarketing laws, including the State of Indiana, unwillingly into a federal regulatory tribunal and furthermore asks that federal tribunal to declare state telemarketing laws null and void. It is therefore barred by the Eleventh Amendment and related state sovereign immunity. Accordingly, Indiana, through its Attorney General, respectfully requests that the Commission dismiss Alliance's petition.

ARGUMENT

The fundamental principle of sovereign immunity bars Alliance from filing a petition for adjudication before an administrative agency that would result in a ruling adverse to the State. The purpose of the doctrine of sovereign immunity is to accord to the States the respect owed to them as sovereign entities as reflected in, but not limited by, the Eleventh Amendment. *Fed. Maritime Comm'n v. S. C. Ports Auth.* 535 U.S. 743, 765-66 (2002). The Eleventh Amendment presupposes that each state is a sovereign entity and is inherently not subject to suit without the state's consent. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54 (1996). The Eleventh Amendment "confirmed rather than established, sovereign immunity as a constitutional principle." *Alden v. Me.*, 527 U.S. 706, 728-29 (1999). Further, the Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.' " *Seminole Tribe* at 58. (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

In *Federal Maritime Commission*, the Court extended sovereign immunity to cover administrative proceedings brought by a private party against a non-consenting agency of a state. The Court observed that the Constitution's framers did not intend to subject States to proceedings "anomalous and unheard of when the constitution was adopted." 535 U.S. at 755 (quoting *Hans*, 134 U.S. at 18). The Court further reasoned that "if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency . . . ." *Id*, 535 U.S. at 760. After observing the similarities between administrative and civil proceedings, the Court concluded that sovereign immunity applied to protect States from administrative

adjudications. *Id*. The Court also ruled that Congress could not conduct an end-run around sovereign immunity by authorizing Article I administrative tribunal to adjudicate matters that are not allowed in an Article III court. *Id.* at 761.

Alliance seeks to subject States with telemarketing laws, including Indiana, to the coercive process of the Commission, hoping to prohibit them from enforcing their laws against interstate telemarketers. While the Commission's order would not be self-executing, the nature of the proceeding nonetheless means that allowing it to move forward would be highly coercive to states such as Indiana, thereby impinging their sovereignty and contravening the plan of the Convention. *Id.* at 760-61. In short, the states must defend themselves before the Commission or compromise their abilities to defend their telemarketing laws when the petitioner seeks to enforce a favorable Commission ruling in federal district court. Indeed, if the Commission were to rule in favor of Alliance, the states, in order to protect their abilities to enforce their telemarketing laws against interstate calls, would have to appeal that ruling to a federal circuit court, pursuant to 28 U.S.C. §2342, or risk forfeiting any right to challenge the Commission's ruling. *See FCC v. ITT World Communications, Inc*., 466 U.S. 463, 468 (1984). And in order to be able to appeal the FCC's decision to a federal circuit court, states such as Indiana must first participate in the FCC proceeding (or later petition the FCC for reconsideration). *See, e.g., Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1366 (11th Cir. 2002). These requirements underscore the adjudicatory nature of this proceeding and demonstrate why it is governed by the holding in *Federal Maritime Commission.*

Nor do any of the exceptions to the sovereign immunity defense apply. Indiana, for one, has not expressed a "clear declaration" that it is waiving its sovereign immunity (*see, e.g., Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *College Sav. Bank v. Fla. Prepaid*

Postsecondary Edu. Expense Bd., 527 U.S. 666, 675-76 (1999)), and Congress has not even purported to abrogate sovereign immunity in this area (much less would there be a Fourteenth Amendment basis for doing so). *See Seminole Tribe*, 517 U.S. at 56 (abrogation requires unequivocal statutory language). While *Ex Parte Young*, 209 U.S. 123 (1908), permits federal courts to enjoin or declare unlawful ongoing federal law violations by particular state officials, the petition seeks a general declaration of state law preemption, not an injunction against a specific state official to stop an ongoing federal law violation, so it does not qualify for the *Young* exception.

CONCLUSION

For the foregoing reasons the FCC should dismiss Alliance Contact Services *et al.'s* Joint Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction over Interstate Telemarketing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To Dismiss was filed electronically and served upon all counsel of record listed below, by United States Mail, first-class, postage prepaid, and email on the 29th day of July, 2005:

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